



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 7, 1995

Mr. Richard Ybarra  
Assistant Attorney General  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR95-1380

Dear Mr. Ybarra:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27608.

The Office of the Attorney General (the "OAG") received several open records requests for documents pertaining to "the now closed investigation of the eight people once indicted for the alleged kidnapping, rape and murder of" Kelly Wilson. You state that you have released to the requestors "numerous public documents." However, you contend that other responsive documents are excepted from required public disclosure. You explain that although the above-referenced indictments have been dismissed, most of the records you seek to withhold pertain to either the OAG's prosecution of ten defendants on 42 indictments relating to alleged sexual misconduct or to the OAG's ongoing criminal investigation into the death of Ms. Wilson. The records you seek to withhold consist of the following:

- a case investigation report prepared by the Prosecutor's Assistance Division of the OAG regarding its investigation of the murder of Wilson;

- lists of individuals who contacted investigators during the initial murder and child abuse investigations conducted by Special Prosecutor Scott Lyford, summaries of those individuals' statements, and related memoranda;

an unrelated police offense report concerning alleged incident of indecency with a child, and related documents;

case notes and witness statements collected by Child Protective Services regarding its investigation of alleged child abuse;

reports of medical examinations performed on the allegedly abused children;

You seek to withhold these records pursuant to sections 552.101 and 552.108 of the Government Code.<sup>1</sup>

Section 552.101 of the act protects "information considered to be confidential by law, either constitutional, statutory or by judicial decision." (Emphasis added.) Section 261.201 of the Family Code<sup>2</sup> reads in pertinent part as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

*See* Act of May 26, 1995, 74th Leg., R.S., ch. 751, § 93, 1995 Tex. Sess. Law Serv. 3888, 3924 (Vernon). Because you have not cited any specific rule that the OAG has adopted with regard to the release of this type of information, we assume that no such regulation exists and conclude that all of the records at issue pertaining to the child abuse investigations are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 (1986) at 2 (predecessor statute). The OAG may not release any information pertaining to alleged child abuse to the public.

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<sup>1</sup>Because we resolve your request under sections 552.101 and 552.108, we need not address the other exceptions you raise.

<sup>2</sup>Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Sess. Law Serv. 113, 262 (Vernon); Act of May 26, 1995, 74th Leg., R.S., ch. 751, § 93, 1995 Tex. Sess. Law Serv. 3888, 3924 (Vernon).

Section 552.101 also excepts information protected by the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have marked one small portion of the records that implicates third-party privacy interests that the OAG must withhold.

You also contend that records reflecting the identities of individuals who contacted law enforcement authorities with regard to the now-dismissed indictments are excepted from public disclosure under both the informer's privilege, as incorporated into the Open Records Act by section 552.101, and section 552.108, the "law enforcement" exception. In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of *citizens* to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added.]

*See also* 508 Tex. R. Civ. Evid; 508 Tex. R. Crim. Evid. ("informer" includes individual who has furnished information relating to or assisting in investigation of possible violation of law). The privilege also protects the contents of communications where the content would tend to reveal the identity of the informant. *Roviaro v. United States*, 353 U.S. at 60.

We agree that the names of *private citizens* who contacted law enforcement authorities regarding the disappearance of Kelly Wilson, as well as any information that would identify them, may be withheld under the informer's privilege. The purpose of the privilege, however, is to encourage "citizens" to report wrongful behavior to the appropriate officials. The privilege is not intended to protect the identity of public officials with a duty to report violations of the law or to otherwise cooperate with law enforcement efforts. Therefore, the OAG may not withhold pursuant to the informer's privilege the names of law enforcement officers who supplied information regarding the closed investigation. Consequently, we must address whether the OAG may withhold the names of law enforcement officers contained in these records pursuant to section 552.108.

Section 552.108 of the Government Code excepts from required public disclosure:

(a) A record of a law enforcement agency or prosecutor that deals with the *detection, investigation, or prosecution* of crime . . . .

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement . . . .

You explain that the OAG is conducting both the murder investigation and sexual misconduct prosecutions pursuant to article 2.07 of the Code of Criminal Procedure, which provides for the appointment of an "attorney pro tem" where the state's prosecuting attorney is disqualified or is otherwise unable to perform the duties of office. We therefore agree with your contention that the OAG is currently acting as a "law enforcement agency" for purposes of section 552.108.

This office has previously held that where a criminal investigation has been closed, law enforcement agencies may withhold names and statements of witnesses only upon the showing that the disclosure might either (1) subject the witnesses to intimidation or harassment or (2) harm the prospects of future cooperation between witnesses and law enforcement authorities. Open Records Decision No. 252 (1980). These two factors must be examined on a case-by-case basis to determine whether governmental bodies may withhold such information. *Id.* In this instance you have not demonstrated, nor is it apparent from a review of the documents at issue, how the release of the names of cooperating law enforcement officers would implicate either of these two factors. The OAG therefore must release those officers' names and statements.<sup>3</sup>

We next address the applicability of section 552.108 to records pertaining to the OAG's pending murder investigation. In *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), the court of civil appeals established the guidelines regarding the types of information contained in police files that normally constitute public information. In Open Records Decision No. 127 (1976) at 4, this office concluded that during the pendency of a criminal investigation, law enforcement agencies may withhold all information created or gathered during the course of criminal investigations pursuant to section 552.108 except for certain information that is typically found on the

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<sup>3</sup>We also note that you have not argued that the release of the *substance* of the informants' or peace officers' statements in the closed investigation would "unduly interfere" with law enforcement efforts. See *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We therefore do not address the applicability of section 552.108 to the statements themselves.

front page of the offense report.<sup>4</sup> *See also* Attorney General Opinion MW-446 (1982) (and authorities cited therein) (evidence gathered during criminal investigation excepted by section 552.108 during pendency of investigation and prior to prosecution). Accordingly, except for those records previously released to the requestors, the OAG may withhold all of its records pertaining to the pending murder investigation pursuant to section 552.108.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/rho

Ref.: ID# 27608

Enclosures: Marked documents

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<sup>4</sup>Because you have not submitted to this office for review the front page of an "offense report" regarding the Wilson murder, we assume that you have released the "front page offense report information," in one form or another, to the requestors. We also note that the front page of the offense report pertaining to the unrelated child abuse investigation is made confidential by section 261.201 of the Family Code. *See discussion supra.*

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